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7 NICK G. TARLSON,
8 Plaintiff,
9 v.
10 UNITED STATES OF AMERICA,
11 Defendant.

12 Case No. 13-cv-03535-JD

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28 **ORDER DENYING MOTION TO
REMAND AND GRANTING MOTION
FOR JUDGMENT ON THE
PLEADINGS**

29 Re: Dkt. Nos. 35, 39

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33 **INTRODUCTION**

34 Plaintiff Nick Tarlson, who is proceeding pro se, filed an amended complaint after the
35 Court previously dismissed his claims. He now moves to remand this case to California Superior
36 Court for the City and County of San Francisco. The United States moves for judgment on the
37 pleadings. A hearing on these motions was held on August 21, 2014. The Court denies the
38 motion to remand and grants the motion for judgment on the pleadings without prejudice.

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41 **DISCUSSION**

42 Because the Court's previous order details the factual background, the Court will not
43 repeat it here. *See* Dkt. No. 26.

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45 **I. Motion to Remand**

46 Mr. Tarlson moves to remand this case because he objects to the United States'
47 certification -- used to support removal of this case -- that Ms. Foster was acting within the course
48 and scope of her employment at all material times with respect to his allegations. *See* Dkt. No. 35.

49 The United States removed to this Court under 28 U.S.C. § 1442, which provides that an
50 officer of the United States may remove any civil or criminal action filed against her in state court
51 for any act under color of such office. Along with the notice of removal, the United States filed a

1 certification pursuant to 28 U.S.C. § 2679(d), in which Alex G. Tse, Director of the Civil Division
2 of the United States Attorney's Office for the Northern District of California, certified that Ms.
3 Foster is an employee of the United States Coast Guard Auxiliary and was acting within the
4 course and scope of her employment at all material times with respect to plaintiff's allegations.

5 *See* Dkt. No. 2.¹

6 Under section 2679(d), the government may remove a case filed in a state court upon
7 certification by the "Attorney General that the defendant employee was acting within the scope of
8 his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. §
9 2679(d)(2); *see also Rodriguez v. Kwok*, No. C 13-04976 SI, 2014 WL 889570, at *3 (N.D. Cal.
10 Mar. 3, 2014). Upon certification, the "proceeding shall be deemed to be an action or proceeding
11 brought against the United States." 28 U.S.C. § 2679(d)(2). The Attorney General's certification
12 is "conclusive for purposes of removal," and "forecloses any jurisdictional inquiry." *Osborn v.*
13 *Haley*, 549 U.S. 225, 231, 243 (2007); 28 U.S.C. § 2679(d)(2). "A challenge to the propriety of a
14 § 2679(d) certification can at most result in the resubstitution of the individual federal officer as
15 the defendant for the purposes of trial, but it cannot result in a remand to state court." *See*
16 *Rodriguez*, 2014 WL 889570, at *3; *Osborn*, 549 U.S. at 242.

17 Because a section 2679(d) certification is conclusive for purposes of removal, the Court
18 may not remand the action to state court regardless of any challenge Mr. Tarlson raises to the
19 propriety of the certification. *See Rodriguez*, 2014 WL 889570, at *3. Accordingly, the Court
20 denies Mr. Tarlson's motion to remand.

21 **II. Motion for Judgment on the Pleadings**

22 Because the Court's previous order provides the governing legal standards, the Court will
23 not repeat them here. *See* Dkt. No. 26. That order granted the United States' motion for judgment
24 on the pleadings without prejudice, and gave Mr. Tarlson 21 days to amend his complaint. *Id.*
25 Mr. Tarlson's amended complaint alleges two claims, "defamation-slander" and "false light -
26 invasion of privacy," and challenges whether certification was proper. Dkt. No. 27.

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28 ¹ 28 C.F.R. § 15.4(a) authorizes the Director of the Civil Division for the district where the civil
action is brought to make a § 2679(d) certification.

1 Mr. Tarlson asks the Court to revisit its finding about whether certification was proper.
2 See Dkt. No. 27 at 3. If Ms. Foster was acting within the scope of her employment, then
3 certification was proper. See *McLachlan v. Bell*, 261 F.3d 908, 911 (9th Cir. 2001). The Court
4 reviews the scope of employment determinations according to the principles of respondeat
5 superior of the state in which the alleged tort occurred. See *id.* California law controls because all
6 of the conduct at issue took place there. See Dkt. No. 27.

7 Under California law, the scope of employment is generally viewed broadly under the
8 respondeat superior doctrine. See *Farmers Ins. Group v. County of Santa Clara*, 11 Cal.4th 992,
9 1004 (1995). An employee's conduct is foreseeable, and therefore within the scope of
10 employment, if it "is not so unusual or startling that it would seem unfair to include the loss
11 resulting from it among other costs of the employer's business." *Id.* An employer's vicarious
12 liability may extend to "willful and malicious torts of an employee," and even if the tortious
13 conduct "contravenes an express company rule and confers no benefit to the employer." *Id.*
14 An employee's complaint about the conduct of co-workers "in ways relating to work, on issues
15 arising out of the work" has been found to be within the scope of employment. See *McLachlan*,
16 261 F.3d at 911. In *McLachlan*, plaintiff alleged that his co-workers made defamatory statements
17 about him because of their resentment and jealousy of his success. *Id.* at 910. Our Circuit,
18 concluding the co-workers' conduct fell within the scope of their federal employment, explained
19 "[t]here is unfortunately nothing 'unusual or startling' about personal hostility, backbiting,
20 resentment of another's success, false rumors, and malicious gossip in the workplace." *Id.* at 912.
21 Moreover, California courts have held as a matter of law² that an employee acts within the scope
22 of her employment when she reports sexual harassment by a co-worker. See *Fowler v. Howell*, 42
23 Cal.App.4th 1746, 1751 (1996). This is so even when the motive for alleging sexual harassment is
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25 ² Generally, whether an employee acted within the scope of employment is a question of fact
26 under California law; "it becomes a question of law, however, when the facts are undisputed and
27 no conflicting inferences are possible." *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal.4th
28 291, 299 (1995). Neither party has raised a factual dispute that prevents the Court from deciding
 the applicability of respondeat superior as a matter of law. Mr. Tarlson asserts in the amended
 complaint that he requires additional facts about the circumstances of Ms. Foster's statements, but
 the allegations in his complaint -- taken as true -- show that her statements were made in the scope
 of her Auxiliary employment.

1 questionable. *See Jacobus v. Krambo Corp.*, 78 Cal.App.4th 1096, 1104 (2000) (“the risk that one
2 worker may accuse another of sexual harassment to deflect an adverse performance review is a
3 risk inherent in employment”).

4 Taking the allegations in Mr. Tarlson’s amended complaint as true, Ms. Foster’s alleged
5 defamatory statements occurred within the scope of her employment. There is nothing “unusual
6 or startling” about Ms. Foster’s report of sexual harassment, even if -- as Mr. Tarlson alleges --
7 she reported the sexual harassment in order to punish him for criticizing her performance of her
8 Coast Guard Auxiliary duties, or to help other Coast Guard Auxiliary leaders who were competing
9 against him for positions on the District Board. *See* Dkt. No. 1 at 2, 4. Whether Ms. Foster filed
10 the complaint herself, or whether the investigation was “instituted by the ‘chain of leadership’” is
11 of no consequence. *See id.* at 4. The Court concludes as a matter of law that certification was
12 proper.

13 Because the United States was properly substituted as the defendant, Mr. Tarlson must
14 bring his tort claims under the Federal Tort Claims Act (“FTCA”). “[T]he FTCA is the exclusive
15 mode of recovery for the tort of a Government employee even when the FTCA itself precludes
16 Government liability.” *Meridian Int’l Logistics, Inc. v. United States*, 939 F.2d 740, 743 n.1 (9th
17 Cir. 1991) (internal quotation marks omitted). Mr. Tarlson’s failure to satisfy the jurisdictional
18 prerequisites for filing a tort claim against the federal government requires dismissal of his claims.
19 Several jurisdictional prerequisites must be satisfied before tort claims can be brought in federal
20 court against the federal government, including that a party must first file a claim with the
21 appropriate federal agency. *See* 28 U.S.C. § 2675(a) (“An action shall not be instituted . . . unless
22 the claimant shall have first presented the claim to the appropriate Federal agency and his claim
23 shall have been finally denied by the agency in writing and sent by certified or registered mail.”).
24 The requirement that administrative remedies be exhausted before filing a claim is mandatory.
25 *Stringer v. White*, No. C-07-5516 SI, 2008 WL 344215, at *4 (N.D. Cal. Feb. 6, 2008). The
26 amended complaint does not allege Mr. Tarlson first presented his tort claims to the appropriate
27 agency and he has presented no evidence or argument he has done so. Because exhaustion of his
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1 administrative claim is a jurisdictional prerequisite, the Court dismisses his claims against the
2 United States for lack of jurisdiction.

3 **CONCLUSION**

4 Mr. Tarlson's motion to remand is denied. The United States' motion for judgment on the
5 pleadings is granted. The Court dismisses Mr. Tarlson's claims without prejudice.

6 **IT IS SO ORDERED.**

7 Dated: October 27, 2014



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9 JAMES DONATO
10 United States District Judge